Supreme Court of the United States.

OCTOBER TERM, 1903.

EDWIN A. McINTIRE, ADMINISTRATOR C. T. A. OF DAVID McINTIRE *et al.*, APPELLANTS AND PLAINTIFFS IN ERROR,

vs.

CHARLES McINTIRE.

No. 85.

Appeal from, and in Error to, the Court of Appeals of the District of Columbia.

Brief for the Administrator C. T. A. et. al. on Cross Appeal and Writ of Error.

STATEMENT OF THE CASE.

An outline of the very long and very troublous history of this case is exhibited in the record by copies of the docket entries of the former orphans' court (1–5) and the circuit court of the District of Columbia (43).

The futile contest against the last will of David McIntire, deceased, begun by his brother, Charles McIntire, in 1885, and continued by Charles McIntire, Jr., administrator and

also son and sole next of kin of said Charles McIntire, fills considerable space in the reports of the general term (19 D. C. 482) and of this Court (162 U. S. 383). The fierceness and pertinacity of the warfare waged at every point along the line against the will itself and against the administrator *cum testamento annexo* have seldom been equaled, even in the history of family feuds. One result is that, although the testator died nearly twenty years ago (on April 1, 1884), and his will was promptly probated and letters *c. t. a.* issued, and the administrator has been trying to settle ever since, the estate, sadly depleted by expenses and losses, is still in the courts.

Death has been busy among the parties, and even among the counsel, several of whom on each side, eminent in their profession, have passed away, but it has not brought peace in the case.

In all these proceedings, either Charles McIntire, or his son and administrator, Charles McIntire, Jr., has been the aggressor and in the position of plaintiff. The administrator *c. t. a.*, besides defending the validity of the will of David McIntire, as he was bound to do *virtute officii*, has always been ready and anxious to settle the estate, and with his mother and sisters has done all that was possible to that end, even going to the bounds of prudence in making concessions for the sake of peace.

Under these circumstances, it is respectfully urged by us that all reasonable intendments should be taken in favor of the administrator *c. t. a.*, as regards those credits allowed to him by the learned jurist (Mr. Justice Hagner) who held the special term for orphans' court business, and which were erroneously, as we submit, disallowed by the Court of Appeals of the District of Columbia.

This court will perceive that on the one side in this controversy is the administrator *c. t. a.*, who is also a

legatee, and with whom are aligned his three sisters and co-legatees, and the legal representative of a fourth sister, now deceased, who had assigned her share to their mother, who is also now deceased. Under the construction given to the will by the courts below, these represent a large amount in special legacies and five-sixths of the residue of the estate. They are entirely harmonious among themselves, and have been strictly on the defensive since the first attack, which was begun during the year after the will was probated and letters granted.

On the other side is now Charles McIntire, Jr., the administrator and universal heir of his father, Charles McIntire, and he is the sole disturbing element.

In the seeming confusion which attended the beginning of the trouble, a group of malcontents were admitted to the litigation, consisting of a Mrs. Galliher and her brothers and sister, children of Henry McIntire, a deceased brother of the administrator *c. t. a.* (9). After putting into the affair the regrettable tinge of bitterness that can exist, it seems, only in fullest intensity between very near relatives, somebody made the discovery that this group had no possible interest in the estate, either under the will or against it.

The last will of David McIntire (6) was probated and letters of administration *c. t. a.* were issued on April 12, 1884 (9).

Afterward, as appears by an allusion in the record (10), a suit in equity of some kind was begun by Charles McIntire, Jr., as a legatee, and the Galliher faction, against Edwin A. McIntire and others; and in that equity suit, on February 19, 1885, in a way that seems open to some criticism as matter of practice, an order was made for the administrator *c. t. a.* to pay into the orphans' court, that is to say, to the Register of Wills (not to the clerk of the

equity court), the assets of the estate. On the same 19th of February, 1885, a consent order was passed in the orphans' court (9, 10, 11) purporting to sanction this and various other arrangements, some of which might be questionable on the point of validity, since consent cannot give jurisdiction.

This was the beginning of the efforts by the administrator *c. t. a.* to get peace restored in the family—efforts which failed. In pursuance of them, however, in April, 1885, in a so-called arbitration before two of the counsel for the various parties (11, 12, 13) he agreed to be charged with an alleged sum of $10,000—saying "[I] will not contest any matters with my relatives" (12).

He did this only upon his four sisters, one of them since deceased, receipting to him, as of date February 25, 1885, for $2,500 each, so that this particular monetary sacrifice toward securing peace was made really by these ladies, one of whom, it is said, was even then in her last illness, and therefore particularly averse from family strife.

Notwithstanding all concessions for peace, Charles McIntire, the surviving brother of testator, began a contest in June, 1885, seeking to have the probate revoked and the will declared void. He made charges of unsoundness of mind of the testator and undue influence, which he produced no testimony whatever to support (162 U. S. 383). On such testimony as he had, issues were tried twice before juries (42, 43) and a verdict directed by the court against him and sustaining the will. The case was carried to the general term, and then after some struggle (3) to this court, where it was decided April 13, 1896. Before that, in 1890, the original contestant had died and his son, as administrator, took his place in the litigation (43) besides having an interest, in his own right, as legatee in case he failed to "break" the will as his father's ad-

ministrator. He was thus "on both sides of the fence."

During the same time proceedings went on actively in the special term for orphans' court business. In August, 1886, a consent order was made (16) that the Register of Wills, whose charges for costs seem to have been disputed (2), deliver all the assets of the estate in his hands:

"To the solicitors for the said parties in interest in said estate, * * * to be held by said solicitors, subject to the further order of the court herein, until the final settlement of the litigation touching the said estate."

This proceeding had no warrant in any statute, and apparently must be regarded as "*de facto sed non de jure.*" It was also an abrogation by consent of the former consent-orders by which the assets were "paid into court"—for the assets went into the hands of Mr. James M. Johnston (afterwards succeeded by Mr. Calderon Carlisle), one of the solicitors for the caveator, and Mr. S. S. Henkle (afterwards succeeded by Mr. Enoch Totten), solicitor for the caveatees (26). The solicitors thus entrusted with the funds were sometimes called by the name of "custodians" (17, 29), but this designation was not derived from any law or statute in regard to the orphans' court. The administrator *c. t. a.* remained in office all this time, performed such duties as he could, some of which were important, since the legal authority and title were always in him, and he rendered accounts from time to time (4).

On petitions of the caveatees, the orphans' court, from time to time, passed orders allowing the "custodians" of the assets to pay out certain sums for fees to the two eminent counsel, both now deceased, who successively defended the will, until $12,000 was thus expended (18,

20, 22, 25). It was recited in the orders that these sums should be charged against the shares of the caveatees in the estate without prejudice to their right to apply to the court to have said sums charged against the estate. When the "custodians" made their final report (27, 28) they took credit for these payments as against the cash which had been in their hands, thus practically charging the payment against the whole estate; and the orphans' court ratified and confirmed this by approving the report and account of the solicitors or custodians (29, 30), and by overruling the third exception to the account of the administrator *c. t. a.* (37). *This report or account of the custodians was participated in by the late Mr. Calderon Carlisle, one of the solicitors for Charles McIntire, Jr., equally with Mr. Enoch Totten, solicitor for the caveatees.*

In June, 1896, the mandate of the Supreme Court of the United States having been filed sustaining the will, and as it must have been apparent that no further progress could be made without restoring the administrator *c. t. a.* to his legal and proper functions, the custodians filed their final report, already mentioned, and on petition of the administrator *c. t. a.* he was directed to file an additional bond in the sum of $100,000 (31), which he did in July, 1896, with corporate security (32), and received again the assets of the estate after twelve years' interval. He has had sole charge of them for the seven years since then.

In December, 1896, the court approved his final account (4), but it was soon afterward contested by the irreconcilable Charles McIntire, Jr., who now came into the arena in his own right as a legatee and opened the contest now before this court. In August, 1897, after some interlocutory proceedings, the administrator *c. t. a.* presented an amended final account (34). Exceptions were filed to

it in October, 1897 (36), by Charles McIntire, Jr. (who always moved deliberately in this affair). They were brought to a hearing and overruled in the following year (39); the account was approved and final distribution was ordered (41).

From this action, Charles McIntire, Jr., appealed to the Court of Appeals of the District of Columbia (40). That court only on some minor details of the accounting differed from Mr. Justice Hagner, and remanded the cause for a restatement of the account in those particulars (68).

McIntire *v.* McIntire, 14 App. D. C. 337.

A restatement of the account was made in the probate court, successor to the orphans' court (47), and was excepted to by both sides (52), but passed over the exceptions (53), and cross appeals were taken (54, 55). In the Court of Appeals the action of the probate court was affirmed without argument (61); both sides appealed to this honorable court, and to provide against any uncertainty in the form of seeking a review here, also sued out writs of error (62, 63).

The questions argued in this brief arise on the exceptions of the administrator *c. t. a.* to the account as finally restated in the probate court.

Specification of Errors.

The rulings of the Court of Appeals erroneously surcharged the administrator *c. t. a.* on the final accounting, against his objections and protest, with over six thousand dollars, made up chiefly as follows:

Commission allowed to him by the orphans' court in its original order on his account, six per cent., would be now, on $86,410.42.....	$5,184 62
One item of fee paid to Mr. S. S. Henkle, as counsel for defending last will of David McIntire.....	500 00
Interest on $10,000, as elsewhere explained	511 40
Interest on a sum of $1,419.73 as elsewhere explained (to be computed).....	
Interest on partial distributions, as elsewhere explained (to be computed).....	

This makes an appealable amount, under the analogy of the decisions in—

Shields *v.* Thomas, 17 How. 5.
Market Co. *v.* Hoffman, 101 U. S. 113.
Texas, etc., Ry. *v.* Gentry, 163 U. S. 361.

Brief of Argument.

It is to be observed all through this case that it is within the bounds of accuracy to say that thus far not one contention on a matter of substance has been successful on the part of the trouble-makers, Charles McIntire, the father and son. This will appear from the fact that they first attacked the validity of the will of David McIntire, and were defeated from court to court, and finally in this the highest tribunal in the land. Charles McIntire, Jr., then attacked the construction put upon the will, and has been defeated from court to court, with a prospect, as we venture to believe, of defeat here.

Only as incidental to all this "false clamor" has Charles McIntire, Jr., been able to gain some rulings on

interlocutory matters, to the disadvantage of the administrator *c. t. a.*, and through him to all the Edwin T. McIntire branch of the family.

Under the fury of the onset of the two Charles McIntires, and the turmoil they have stirred up during nearly twenty years of strenuous but practically unsuccessful litigation, it would have been wonderful if the administrator *c. t. a.* or his various counsel had never made any formal slips, which might have been avoided on a calmer survey of the situation. But we submit that the assailants, defeated on the merits of the main issues raised by them, ought not to reap a benefit from mistakes that never would have occurred but for the confusion due to their contest. A simile may be borrowed from Emerson's "Conduct of Life":

> "Like a boat about to be overset, or a carriage run away with—not only the foolish pilot or driver, but everybody on board is forced to assume strange and ridiculous attitudes, to balance the vehicle and prevent the upsetting."

It is easy to see now that this estate ought to have been left in the hands of the administrator *c. t. a.*, at first as at last, instead of going the rounds of the Register of Wills and a number of "custodians;" it ought to have been settled during the nineteenth century instead of lagging over into the twentieth, etc., etc.; but these things were due primarily to the contests of Charles McIntire, Senior and Junior, the Achilles and Pyrrhus of this long siege, each of them—

> "*Impiger, iracundus, inexorabilis, acer.*"

Of course it was their privilege to apply to the courts and litigate to the extent of their ability, but the question is now whether the administrator *c. t. a.*, who was always

the party attacked, and who acted strictly on the defensive, as much so as any defendant in a suit at law, and whose task has been made most onerous and difficult by these attacks, shall be mulcted for the benefit of the assailants.

I.

First Exception of Administrator C. T. A. (52).

This relates to the disallowance of all commissions to him by the Court of Appeals, after the orphans' court had allowed him six per cent.

The allowance of commissions is a matter peculiarly within the province of the orphans' court, which has a close-at-hand view of the administration of the estate; and so far as discretion is vested in that court, its exercise is not subject to appeal.

Wilson *v.* Wilson, 3 G. & J. 201.

Parker *v.* Gwynn, 4 Md. 423.

Sinnott *v.* Kenaday, 12 App. D. C. 115; 14 App. D. C. 1.

The recital in the order of February 19, 1885 (10), "That said Edwin A. McIntire shall act as administrator of said David McIntire, but without any allowance for commission or other charge for his services as such administrator," is not only of very doubtful validity in law, but was evidently *conditional* upon what follows, and upon the whole arrangement of compromise, by which the assets of the estate, amounting then to some $50,000, were to be put in charge of the Register of Wills, the administrator *c. t. a.* was not required to increase his then bond of $8,000, a speedy settlement was expected, and the duties would be merely nominal.

Five months after that date the contest of the will was begun, and the estate has been tied up for a length of time wholly unanticipated. The whole situation has utterly changed. The Register of Wills received a handsome percentage for the short time during which he held the property (30). The solicitors who acted as custodians of the funds received a still larger one (30). Finally, the administrator *c. t. a.*, besides his work and anxiety in defending the will, was required to give an additional bond of $100,000 (31); whereupon the assets were delivered to him again, and he was charged with the heavy responsibility of distributing them in a hotly contested litigation. It would certainly be unreasonable to deprive the laborer of his hire under such circumstances. He has served more than seven years for the Rachel of his commissions.

It is especially worthy of note that Justice Hagner, who signed the order of the orphans' court of February 19, 1885 (9), allowed the commissions in the account approved March 5, 1898, thus showing how he understood his former order, in the light of the circumstances, and putting a construction upon it.

In *Eversfield* v. *Eversfield* (4 H. & J. 12, 13), even where an executrix had agreed to charge no commission, and the orphans' court had acted upon that agreement, yet, when she afterward applied for her commission, it was held that the court should grant it.

The right to commissions is a valuable right, and cannot be divested by an agreement without consideration or with a consideration that fails.

So where one executor claimed to have done all the work pertaining to his position, he was nevertheless directed to share his commission with his co-executors.

Richardson v. *Stanbury*, 4 H. & J. 275.

So the allowance made for commissions to a collector was held to have no effect upon the commissions of an executor or administrator of the estate.

Wilson v. *Wilson*, 3 G. & J. 20.

The learned Court of Appeals said, in reference to this subject (74): "*All* that remained to be done when the assets were redelivered to the administrator was to settle the final account and procure an order of distribution. The litigation over the will had ended in its establishment. *The labor and responsibility of administration were practically ended.*" (!)

With due respect to that court, this seems to be a complete misapprehension. The administrator has been charged with the responsibility of these assets, under bond of $100,000, since July, 1896. An examination of his account will show the collections he has had to make, the investments he has had to look after, the partial distributions he has conducted.

In the simple (?) task of settling the final account he has had to go, with the assistance of counsel, from the orphans' court to the Court of Appeals, from the Court of Appeals back to the probate court, and from the probate court back to the Court of Appeals, and then to this Honorable Court.

He can scarcely be expected to agree that the "labor and responsibility of administration were practically ended" when he received the assets for the second time.

The Court of Appeals also remarks that in any view only five per cent. can be allowed to the administrator because five per cent. was allowed to the "custodians," and the court is limited to ten per cent. in all. The difference of one per cent. which might be disallowed under this point need not be dwelt upon at length. We submit that the

allowance to the "custodians" is either an extra-legal proceeding which has no bearing on the legal rate of commissions, or the "custodians" were practically collectors of the estate within the principle of *Wilson* v. *Wilson*, 3 G. & J. 20. *The counsel for Charles McIntire, Jr., was one of the "custodians," and received half the commissions of five per cent.* (*about* $4,000) *allowed to them.*

II.

Second Exception of Administrator C. T. A.

This refers to one of the minutiæ by which on the reaccounting the delay caused by the contestants has been made to tell against the administrator *c. t. a.* and his branch of the family.

A partial distribution was made on or about January 1, 1898, by consent, the contestant, Charles McIntire, Jr., insisting that he get over $6,000, while the other beneficiaries received only $2,800 each. The $6,022.22 paid to Charles McIntire, Jr., was charged of course, against his share of the *residue* of the estate. We submit that the $2,800 paid to the others should be charged against their share of the residue in order to be consistent. It was charged by the court below against their special legacies to their disadvantage inasmuch as these bore interest.

The same reasons apply to the $2,500 each assumed by four of the special and residuary legatees (49, 50). These sums should be charged against their share of the *residue.*

Where money is paid to a party who holds both an interest bearing and a non-interest bearing obligation, he has a right to apply it on the latter.

Jones *v.* U. S. 7 How. 681.

III.

Third Exception of Administrator C. T. A.

The learned Court of Appeals, in its careful scrutiny discovered a point (73) which had not been expressly raised by the contestant below, and while it very properly sustained the credit for the bulk of the counsel fees for defending the last will of David McIntire, it surcharged the administrator *c. t. a.* (48) with one such fee paid, of $500, because the petition and order therefor (14, 15) were in slightly different form from those for the other counsel fees. We submit that through attention to form this is inconsistent in substance. The petition (14) shows that the fee was paid *for defending the last will and testament of David McIntire* from unjust attack, just as the other fees were; and it seems too much of a refinement of technicality to exclude it because the petition and order, being the first of the kind in the case, were not as cautiously worded as those subsequent.

IV.

Fourth Exception of Administrator C. T. A.

The facts in regard to the item of $10,000 have already been referred to in the first part of this brief. The four sisters of the administrator *c. t. a.*, one of whom, Adaline, was then on her death-bed, thinking that a disagreeable conflict with their own kinfolk, and a family disruption could be averted, insisted on assuming the burden of the disputed amount of $10,000. Their method of doing so was by giving their receipts for $2,500 each, whereupon the administrator *c. t. a.* agreed to be surcharged with $10,000, thus balancing his account in that respect. It was expressly made a part of the settlement, in the paper

filed by him and acted upon by the arbitrators (11, 12), that these receipts should be accepted as disposing of the sum at the same time that he was charged with it. It was not intended that in addition to diminishing the shares of his sisters by $2,500 each, the administrator *c. t. a.* was to be charged with interest on a sum of $10,000, whose actual existence he has always denied (10), though willing to assume the amount constructively for this particular purpose and in the hope of peace. Nothing was said in the arbitrators' report or the order of court thereon (13) about any interest, and there is nothing in the circumstances to cause interest to be charged. A court does not charge a fiduciary with interest, unless he has unreasonably detained money or has used it or realized interest on it himself.

Wilson *v.* Wilson, 3 G. & J. 20.

Handy *v.* State, 7 H. &. J. 42.

This constructive distribution of an amount constructively received was made within the year after testator's death (12). Neither Charles McIntire nor Charles McIntire, Jr., complained of it, or claimed any part in that particular distribution—for the father was, doubtless, preparing the contest of the will which he filed very soon afterward, and which made it uncertain whether he or his son would be entitled to the distributive share going to their branch of the family. Curiously enough Charles McIntire and Charles McIntire, Jr., were then, in effect, antagonistic even to each other. Their unsuccessful contest has kept the estate from being all distributed promptly, and ought not to be rewarded with interest charged like a penalty upon the administrator *c. t. a.*, who was rendered powerless to distribute the estate by the action of the court or contestants.

Without doubt, the administrator *c. t. a.* expected at that time—in April, 1885—an immediate distribution of the whole estate, as no contest of the will had then begun. If such a distribution had been made under the will, Charles McIntire, Jr., would have received the benefit of this surcharge of $10,000. The delay has not been due to the administrator *c. t. a.*, nor could he use or invest money which he did not have.

V.

Fifth Exception of Administrator C. T. A.

This has reference to a balance of $1,419.73 in the hands of the administrator *c. t. a.* from a dividend on Pennsylvania R.R. stock in 1891. At the time it was received, the order to pay the assets to the Register of Wills was certainly no longer in force, for the assets had been transferred to the solicitors of the parties (16) in 1886. The administrator *c. t. a.* reported this small balance publicly to the court (35), but no action was taken by the court or any of the parties to make him pay it to his solicitor and the opposing solicitor as "custodians," and it accordingly remained in his hands, in the hope that the litigation would soon terminate. It was kept intact and not mingled with other funds, and there is of course no proof that he used it or made interest on it.

On the contrary, under a suggestion in the opinion of the Court of Appeals (76) he filed affidavits (45, 46) showing that he retained the amount by advice of his counsel, Mr. S. S. Henkle, who was one of the "custodians," and made no use of it except to pay out of it some costs of the litigation that has been forced upon him.

We submit that the decree of the Court of Appeals of

the District of Columbia should be reversed, in so far as to sustain the exceptions of the administrator *c. t. a.*; but that the exceptions of Charles McIntire (Jr.) should be overruled, on his appeal and writ of error (No. 84 at this term), to be heard herewith, but in regard to which we file a separate brief.

WILLIAM HENRY DENNIS,
HENRY E. DAVIS,
CHARLES COWLES TUCKER,
Attorneys for Administrator C. T. A. et als.